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STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF CHESTERFIELD) 1015-CP-13-00379

) TOWN OF MCBEE, SOUTH
CAROLINA
 PLAINTIFF)
 vs.) TRANSCRIPT OF RECORD
)
) ALLIGATOR RURAL WATER &
SEWER COMPANY, ET AL.
 DEFENDANT)

May 24, 2016
Chesterfield, South Carolina

B E F O R E:

THE HONORABLE ROGER E. HENDERSON, JUDGE.

A P P E A R A N C E S:

MARTIN S. DRIGGERS, JR., ESQUIRE
Attorney for the Plaintiff

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Attorney for the Plaintiff

MARGUERITE S. WILLIS, ESQUIRE
Attorney for the Plaintiff

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WILLIAM O. SPENCER, JR., ESQUIRE
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HATTIE O. GORDON
Circuit Court Reporter

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I N D E X

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EXHIBITS

NO EXHIBITS WERE MARKED OR ADMITTED INTO THE RECORD

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THE COURT: All right. This is your motion if I'm not mistaken.

MR. ZEIGLER: May it please the Court. It will be brief. This is a motion asking the Court to reconsider an injunction that was issued on the 20th -- excuse me, on the 12th of April. There are two grounds for the motion. They're simple.

First ground is that the order does not provide for any provision for a bond to support the injunction. We filed with the Court back on the 29th of March an affidavit of Mayor Campalong of the Town of McBee, and the Mayor indicated that the Town will be paying approximately \$68,000 a year extra in fees to continue to take the water from Alligator if it was required to do so for -- based on the record such as it is.

As the Court is aware the Town invested something on the order of \$480,000 in a refurbished well system and carbon filtration system most of which -- a good part of that was paid for by grants, but \$250,000 is actually in loans that the Town has taken out. Those assets are sitting idle and can't use them while this order is in place.

They shouldn't have to purchase water from Alligator. If the Town is correct that the -- that it

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should be allowed to turn on those pumps and some treatment system it really does not have any good way, that we can see at this point, to get the money back from Alligator. It would have to buy Alligator Water. Alligator would have to produce the water. There is a valid contract, we believe, for that to happen. I understand. There is nothing wrong there, we just are not sure how we would recover for the losses we would have unless we were allowed to recover the cost.

The affidavit is clear about the amount. It is an amount that relates to such things as electricity, cost of actual pumping the water, chemicals. There is a small amount, but there are chemicals involved. And you would have to -- those would be the costs that the Town would save by not using Alligator Water.

But we think that the -- that by imposing the injunction is unfair to the Town. There needs to be a bond to cover approximately \$150,000. That would cover a couple of years of litigation if it takes that long.

Now, of course, at the end of the day we would expect that if we do end up winning, and we have to go back and collect on the bond; we provide all the receipts and County documentation that explains the actual amounts lost, the bond secures that. That's the first point, but we do need the bond.

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I think the rules and the Supreme Court opinion is very clear that there has to be a bond set in an injunction and it has to be more than a nominal amount. The only evidence before the Court on the amount on the costs of those is what has been identified by Mayor Campalong in his affidavit.

The second point goes to the substance of the case. As the Court is well aware in order to issue an injunction -- for an injunction to withstand scrutiny the party seeking the injunction has to show a likelihood of success on the merits.

We argued this extensively a while back in Darlington since that time we have gone back and addressed some of the Court's concerns as they were raised there in Darlington. The specific concern is how is the Town of McBee not bound to continue to pay for water from Alligator under 1926(b).

As the Court pointed out McBee believes that it confused 1926(b), but 1926(b) says Alligator can't come and take a customer if that customer is A.O. Smith. We believe that's very significant. The Court said, "how is it any different -- well, how can McBee remove itself from taking service from Alligator."

The case we cited for you answers that question very directly; is CSM Utilities, Inc. It's a 1993 case. It's

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the Seventh Circuit, U.S. Court of Appeals. So one step below the Supreme Court. It is the controlling federal precedent on this point. And what that case says is that, "An entity that is subject to 1926(b) that is a wholesale customer of another entity can put in its own well and treatment system into operation and that doesn't implicate 1926(b). The exact, same situation we have here.

There CSL had been a wholesale customer of Jennings Water Service for a number of years. CSL decided that it wanted to put its own water treatment system in to production to displace all or part of the Jennings' Water System service. Jennings went to them and said, "No. You can't do this under 1926(b)." The Court looked at it and said, "No, 1926(b) does not stop someone from supplying their own need for water with their own wells or with their own supplies."

The Court analogized the situation of a customer, a barber who might have taken water from a 1926(b) utility, you decide to put your own well in to supply part of this farms with water needs from his own well. That's not prohibited. So the Court I think is in this CSL case was very clear that the situation that we're in now, a wholesale customer that wants to supply all or part of their needs for water from their own resources, is not

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limited in doing so due to 1926.

That being said I think that Alligator really doesn't have a claim on the merits here that they are -- and cannot show a likelihood of success on the merits. As a result an injunction is effective because there is no possibility of that happening. We would argue that on those two bases the Court should reconsider the order it issued back in April and should reverse itself.

THE COURT: Thank you, sir.

MR. SPENCER: Please the Court, Your Honor. First, as it relates to the issue of bond, in a memorandum filed with the motion by Mr. Zeigler he refers to Rule 65. Under Rule 65, Subsection C, Security, down in the middle of the paragraph it says, "No such security shall be required of the State or of an officer or agency therefore." You go to the organization to Chapter -- I guess you call it Title 33, Chapter 36, the preamble of general provisions, Alligator is a corporation. Not hyphen for hyphen profit hyphen financed for federal or state loans.

The General Assembly finds that corporations not for profit, with hyphens, established pursuant to this chapter have been authorized to provide the local governmental functions of water service or sewage

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treatment or a combination of both, fire protection service, ambulance service and medical facilities. Corporations not hyphen for hyphen profit exists for a public purpose, and the General Assembly declares that corporations not for profit must be treated like a special purpose district for purposes of Chapter 78 of Title 15, which is the governmental Tort Claims Act.

Chapter 56 of Title 12, Sections 56-378 and 58-31-30, Subsection 23 of the Code, it has the power to condemn the statement. Corporations not for profit may participate under the same conditions as afforded special purpose districts in this -- in the State retirement system, the health insurance system, the State purchasing program and then it cites on more sections that gives the same power as a governmental entity.

Under the Tort Claims Act governmental entities means the State. Under that it defines the public subdivision, and it says, "And special purpose districts of the State." Of the state. Not county. Not municipality of the State. Of the State, and the statute says we have the same power as a special purpose district of the State. We are covered by everything that the State is covered by. We are covered in this lawsuit by the governmental Tort Claims Act. We are the State of South Carolina, and we don't have to post a bond.

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And that takes care of the bond issue. We the \$150,000 come from? I don't know. They haven't lost anything. Since 1999 he says there must be an irreparable injury. Since 1999 we have sold every gallon of water that the Town of McBee has used. The status quo ought to be continued. Okay. This is not a drastic remedy. They have gotten our water since 1999. You brought that out the last hearing, Your Honor, when you issued the order. There is nothing drastic happening. Let the status quo remain.

Also he says that they went on 7 USC 1926(b); that we've got to prove that we can win on the merits. He quotes a case from the Seventh Circuit. There are 11 federal circuits in the United States of America. We're in the Fourth. Okay. There has been a ton of litigation involving 7 USC 1926(b) over a period of about 40 years. There is a massive body of law.

What we have here though is the United States government says that this contract in which we provide them water is collateral for a U.S.D.A. Rural Development Loan for Alligator and a U.S.D.A. Rural Development Loan for the Town of McBee. This contract where we provide them water a lien is on it by the United States government, the United States Department of Agriculture. This is a complex case. Won't hurt a soul, since 1999, if we keep

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selling them water during this litigation.

Also since all this was filed the Court has permitted A.O. Smith to become a party. They're now a party and they have a dog in the fight. In the meantime the Town of McBee has attempted to amend its answer. I mean its complaint adding two parties and more causes of action against Alligator. And causes of action against A.O. Smith.

This is not the time to be doing away with an injunction. Your Honor, we're just now in the beginning. We're just now getting that this is a complex case. And so we're not required to put up a bond. There is no reparable injury, and nobody knows what the merits of the case are going to go because it's federal law, and it's a large body of federal law. That's all I have.

THE COURT: Thank you Mr. Spencer. Yes, sir, Mr. Zeigler.

MR. ZEIGLER: Thank you, Your Honor. It's sounds like the pile of federal law as Mr. Spencer indicated I've gone through it in some detail. There simply is no other case on this point. This is a considered case by U.S. Federal Circuit Court. It is four square on this issue. If there were some other cases you would certainly be hearing about it today.

The other thing that I would say in that regard is

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that the reason there is not another case is because this case has been followed across the country. Everyone understands that this is the law and nobody is trying to change it by raising those questions again.

It's been settled law since 1993, and it remains settled law today. So that is the law that we faithfully have to apply. The law is preeminent in this matter. Under the statute the federal interpretation is clear as day. This is the law that applies.

Let me speak to the question of Alligator's status. Alligator is not a part of the State government. There is a statute which Mr. Spencer quoted which says, "In certain limited cases Alligator can do some of the things -- enjoy some of the benefits of a governmental entity." There is nothing in that list that he read about any of the rules of civil procedure. Alligator is not generally a governmental entity. It's a private corporation that gets to do some of the things that governments do.

The private for profit water companies have condemnation rights that private for profit companies that have the right to provide important public services. There is nothing unusual about that across State government. There is a bright line distinction between what the governmental body can do, what services they can

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provide and what a private one can't.

Alligator is a private for profit corporation. As such it is required to post a bond if it wants to get an injunction. That's what the rules require. That's what the rules clearly state. Nothing what Mr. Spencer gave you said anything about Alligator being treated as a governmental entity for purposes of the rules of civil procedure as enunciated by the Supreme Court of this State and adopted by.

I think they failed on this point, but the case, I think, is going to be a very complicated one. It's a complicated case because it's a complicated case of facts. The question about 1926(b) are not complicated. 1926(b) applies. If you have a retail customer that's been connected to supplier as the U.S.D.A. loan, and that is the case of AO Smith and with McBee. McBee has a U.S.D.A. loan. AO Smith has been a customer for over 30 years.

What we know now from CSL Utilities is that a wholesale customer of an entity financed by U.S.D.A. can put its own water treatment supply systems in operations, and that this does not in any way implicate 1926(b) or the matters relating to it. So I would suggest to you that nothing here changes what I said when I began. 1926(b) does not allow Alligator to show, like on success

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of the merits, and under Rule 65 Alligator has to post a bond.

There is no evidence that contradicts Mayor Campalong's affidavit as to a bonding fee in the order of \$68,000. The status quo today is that the Town of McBee has spent \$480,000. Borrowed \$250,000 of that money to put in place water assets and has every right to want to benefit from it. And the Town of McBee needs to do that. If not it's going to lose money due duplicative investments they can not recover. And if this case drags on the Town of McBee needs a source of funds to recover what it lost because it was prevented from putting its own assets in service at this time. Thank you, Your Honor.

THE COURT: All right.

MS. WILLIS: Your Honor, may I speak if I can?

THE COURT: Yes, ma'am.

MS. WILLIS: Good afternoon. Marguerite Willis on behalf of AO Smith, the intervening defendant. The Court may recall that last time we were together in Darlington I stood up and I said that my client is the biggest employer in the County. 500 employees. We're good citizens, and all we wanted was a safe, reliable, dependable, and adequate water supply.

We felt like our interests weren't being adequately

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represented then. Your Honor grants the motion to intervene. I simply report today that following that we filed our answer and our counterclaim, and our counterclaim just asks for a declaration that we are an at will customer; that we weren't bound as it were to the City of McBee, and we also asked for an account. We didn't ask for any money. We just asked to be part of the process. Well, to our surprise what we received in response was a brand new amended complaint that adds two parties without motion under Rule 19.

It added additional claims against us and against Alligator without reference to Rule 15. And so I drafted a motion to strike, and I filed that today. I only say that because I spoke to Mr. Spencer who has a really good motion to strike under Rule 15. The pleadings enclosed with regard to his claim for six month before this amended complaint comes in over the transom.

And I said, "Billy, why did you in addition to filing a motion to strike, why did you file an answer?" And Billy said, "Cause I'm afraid, Marguerite, under circumstances of (inaudible)." And so I just want to put on the record that today I did ask Mr. Zeigler, I said, "I filed a motion to strike. Are you going to try to default AO Smith?" And he said, and he can correct me if I'm wrong, "No. He will let me know if he thinks that

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I need to file an answer."

I want that clearly on the record here because otherwise even though the motion to strike, I believe, comes off the basis is Rule 15, the failure to seek permission of this Court or even yours truly before filing a claim. The failure under Rule 19 to move the Court to add Mr. Irvin and his company as branding parties. And most importantly to my client the violation we say of Rule 19 where the new complaint says, "All we wanted was to tell the Court what our needs and demands were for our plant." Now says that, "We, AO Smith, wantonly and recklessly sabotaged McBee's water system, made false reports to D.H.E.C, depleted the level of water in McBee's water tank, and made and publicized other false reports." Those statements are simply false.

We are going to talk to counsel for McBee about that. We would prefer to have the chance to talk to them in context of a motion to amend which we believe they should have filed under Rule 15, but I feel that for today that motion is not ripe before Your Honor but I have the commitment of counsel for the Town that they will not default my client.

MR. ZEIGLER: Your Honor, if I may. Ms. Willis is correct. She and I discussed that point and I made that commitment to her and I plan to stand by it. I'm not sure

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why it needed to be put on the record. I think that my word would be of some value here.

But let me, since we're assuming to want to argue the motion -- the question of amended complaint, it is our right when someone files a counterclaim ---

THE COURT: It's really not before the Court. He made reference to it, but we're not arguing that today.

MR. ZEIGLER: Well, that's good cause I just want to be sure. We seem to have gone a long way into arguing that so far. This isn't the time. Document was filed this morning, and ---

THE COURT: And I said we are not arguing that. I'm not going to rule on that.

MR. ZEIGLER: --- continue today ---

THE COURT: It's not before the Court.

MR. ZEIGLER: I'll save that for when the time comes, Your Honor. This isn't the time. We certainly and we believe that there is a reason for procedural default visa vee the need to answer the complaint before this motion to strike is heard and will raise that with counsel for the Defendants and we will deal with it professionally.

THE COURT: Anything else?

MR. SPENCER: One thing I failed to mention, Your Honor. Alligator's right to sell water to customers out

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of some wells has not completely been resolved. It is pending in the Administrative Law Court under 16-AOJ-07-0082-6C, McBee's right to sell some of its own wells, the AO Smith got an adverse ruling and Nexsen Pruet has filed a petition for reconsideration in the Administrative Law Court. So the litigation as to whether their permit is proper has not been fully litigated in the court system.

THE COURT: All right. Okay. All right. Counsel, I will need to take this matter under advisement. I need to review the CSL case again that Mr. Zeigler eluded to and consider your arguments. You'll hear from me next week or so.

MR. SPENCER: Thank you, Your Honor.

MR. ZEIGLER: Thank you, Your Honor.

MS. WILLIS: Thank you, Your Honor.

END OF TRANSCRIPT OF RECORD

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